Supreme Court, U.S.
FILED
93 1185 JAN 20 1994
OFFICE OF THE CLERK

No. _____

IN THE
Supreme Court of the United States
October Term, 1993

CHARLES H. WILLIAMS,
Petitioner,

v.

EDWARD C. SALTZSTEIN, JOSEPH BROWN III,
AND JAMES C. LEWIS,
Respondents.

Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

MARK BERRY
EDWARD W. DUNBAR
1700 North Stanton
El Paso, Texas 79902
(915) 532-3638

Counsel for Petitioner

January 20, 1994

Alpha Law Brief Company • Houston, Texas • (713) 981-9000 • 1-800-981-9001

42 pp

QUESTIONS PRESENTED

1. Is the deprivation of salary from a person possessing a property right in employment actually a deprivation of the employment right itself?

2. Does the severance of salary from a property right in employment for the purpose of applying a lesser standard of protection violate the holdings in *Cleveland Board of Education* v. *Loudermill* and *Mathews* v. *Eldridge*?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Charles H. Williams and the defendants Texas Tech University Health Sciences Center, Edward C. Saltzstein, Joseph Brown III and James C. Lewis. All claims were voluntarily dismissed against the Health Sciences Center.

The respondents before this Court are Edward C. Saltzstein, Joseph Brown III and James C. Lewis, individually and in their official capacities.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 7

I. The Fifth Circuit has for the first time in a due process case severed a property right to salary from a property right to employment itself 7

II. The Fifth Circuit has allowed a tenured professor's right to employment to carry the "bitter with the sweet" in violation of the rule in *Cleveland Board of Education* v. *Loudermill* 9

III. The misapplication of *Mathews* v. *Eldridge* by the Fifth Circuit cannot justify the severance of salary from a protected property interest in employment, and raises important and unresolved questions 11

CONCLUSION 17

APPENDIX A (Opinion and Judgment of Court of Appeals, and Memorandum Opinion and Judgment of District Court) 1a

TABLE OF AUTHORITIES

Cases **Page**

Arnett v. Kennedy,
416 U.S. 134 (1974) 13, 14

Best v. Boswell,
696 F.2d 1082 (11th Cir. 1982),*cert. denied*,
104 S.Ct. 103 (1983) 15

Bishop v. Wood,
426 U.S. 341 (1976) 12
Board of Regents v. Roth,
408 U.S. 564 (1972) 7, 12, 13
Cleveland Board of Education v. Loudermill,
470 U.S. 532 (1985) 9, 10

Conley v. Board of Trustees of Grenada County Hospital, 707 F.2d 175 (5th Cir. 1983) 12

Eguia v. Tompkins,
756 F.2d 1130 (5th Cir.1985) 11, 13

Ferguson v. Thomas,
430 F.2d 852 (5th Cir. 1970) 6, 8

Findeisen v. North East I.S.D.,
749 F.2d 234 (5th Cir. 1980) 13

Goldberg v. Kelly,
397 U.S. 254 (1970) 12

Goss v. Lopez,
419 U.S. 565 (1975) 13

Harden v. Adams,
760 F.2d 1158 (11th Cir. 1985) 13

Hardiman v. Jefferson Cty. Bd. of Educ.,
709 F.2d 635 (11th Cir. 1983) 15

Logan v. Zimmerman,
455 U.S. 422 (1982) 7, 12

Louise B. v. Coluatti,
606 F.2d 392 (3rd Cir. 1979) 16

Martinez v. South San Antonio I.S.D.,
817 F.2d 1124 (5th Cir. 1987) 12

Mathews v. Eldridge,
424 U.S. 319 (1976) 7, 8, 11, 13, 14, 15, 16

Morrissey v. Brewer,
408 U.S. 471 (1972) 7

Orloff v. Cleland,
708 F.2d 372 (9th Cir. 1983) 13

Perry v. Sindermann,
408 U.S. 593 (1972) 12

Simmons v. Drew,
716 F.2d 1160 (7th Cir. 1983) 13

Sniadach v. Family Finance Corp.,
395 U.S. 337 (1969) 13

Texas Faculty Ass'n v. University of Texas at Dallas,
946 F.2d 379 (5th Cir. 1991) 12

White v. Miss. St. Oil & Gas Bd.,
650 F.2d 540 (5th Cir.(1981) 12

Williams v. Texas Tech Univ. Health Sciences Center,
6 F.3d 290 (5th Cir. 1993) 6

Wells v. Hico I.S.D.,
746 F.2d 243 (5th Cir. 1984). 12

Yatvin v. Madison Metro School Dist.,
840 F.2d 412 (7th Cir. 1988) 13

Constitutional Provisions and Statutes:

U.S. CONST. amend. XIV 2

42 U.S.C. §1983 . . . . . 2, 3

NO._____

IN THE

Supreme Court of the United States

October Term, 1993

CHARLES H. WILLIAMS,
Petitioner,

v.

EDWARD C. SALTZSTEIN, JOSEPH BROWN III,
AND JAMES C. LEWIS,
Respondents.

Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Charles H. Williams respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled proceeding on October 22, 1993.

OPINIONS BELOW

The opinion of the court of appeals is reported at 6 F.3d 290 (5th Cir. 1993), and is reprinted in the appendix at 3a, *infra*.

The memorandum opinion of the United States District Court for the Western District of Texas (Smith, D.J.) has not been reported. It is reprinted in the appendix at 15a, *infra*.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §1331, §1343(3), and §1343(4), where petitioner sought relief under 42 U.S.C. §1983, petitioner brought this suit in the district court. On July 23, 1992, the court granted respondents' motion for judgment as a matter of law.

On petitioner's appeal, the Fifth Circuit on October 22, 1993, entered a judgment and opinion affirming the trial court's judgment. No petition for rehearing was sought.

The jurisdiction of the Supreme Court to review the judgment of the court of appeals is invoked under 28 U.S.C. §1254(l).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

U.S. Const. amend. XIV, §1 provides in pertinent part:

> ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person the equal protection of the laws.

42 U.S.C. §1983 provides in pertinent part:

> Every person who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected,

> any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, of other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioner is a tenured associate professor at the Texas Tech University Health Sciences Center (TTUHSC). In 1991 he instituted this action for damages and equitable relief pursuant to 42 U.S.C. §1983. The complaint alleged that in September 1989, officers of TTUHSC, respondents herein, without notice or cause deprived petitioner of his property right in his employment.

Petitioner has a doctor of philosophy degree and has worked for TTUHSC since 1982. Most of his work at the Center has been in the area of anesthesiology. In 1986 Dr. Williams was granted tenure by the board of regents of the university. According to the regents' rules:

> *Concept of Tenure*. Academic tenure has been developed so TTUHSC may have the benefit of the competent and honest judgment of its faculty. It thus recognizes the professional status of the faculty member and assures that employment may be terminated only for cause or as noted below. After tenure is granted, the burden of proof rests on TTUHSC when it wishes to dismiss a faculty member.

At the time he was granted tenure petitioner was receiving a salary of $45,204.00 per annum. In 1987 his salary was increased to $64,800.00 per annum.

In July of 1989 the regents gave Dr. Williams a raise to $66,045.00 per year. This raise was approved by the President of TTUHSC, and became effective September 1, 1989. Petitioner was told in July 1989 that his full salary was in the budget.

On September 6, 1989 the department chairman, Dr. Edward C. Saltzstein, informed Williams that, "The climate's getting very bad here for you. Joe Brown, Ken Barker, and James Heavner don't like you, and I think you should leave here." One day later, with no prior notice to petitioner, a change of status form was initiated directing that William's salary of $66,045.00 per annum be reduced by $19,596.00 yearly to $46,449.00 per annum. This form was subsequently signed by the associate dean, Joe Brown III, and executive assistant James C. Lewis as well as by Dr. Saltzstein. Petitioner did not learn that thirty percent of his salary, or almost $20,000.00, had been taken until he found it missing in his October paycheck.

Respondents have admitted Williams was neither incompetent nor in any breach of duty. Dean Brown testified there was no cause for dismissal. None of the causes for dismissal of tenured faculty, as enumerated by the board of regents, existed for discharge. Rather, respondents have argued they did not take petitioner's employment, only a portion of his salary. As the argument goes, salary is separate from employment and does not require the procedures necessary for dismissal. This notion is primarily based on a rule of the regents which stated:

> A tenured appointment assures the right of the faculty member to a continuing academic position of employment. The tenured faculty member's contract, however, is subject to possible annual adjustments regarding salary, rank, and conditions of employment.

Respondents also argued that the source of funding assigned to petitioner's salary determined the amount of process due even though respondents were capable of unilaterally deciding which funds would be used for any particular salary.

The heart of this case was addressed by the district court in its memorandum opinion. It recognized that the tenure rule allowing "annual adjustments regarding salary..." would **not** apply to petitioner's remaining annual salary of $45,204.00 after the $20,000.00 yearly deduction. The court reasoned that the property interest petitioner held in his employment must extend to this remaining sum, which the court called his "base salary". For this not to be the rule, the court stated, the institution would be allowed to lawfully reduce a tenured faculty's salary to $1.00 without due process. This ruling, on its face, recognizes that the due process required for taking the salary connected to the employment is the same as the due process required for taking the entirety of employment.

The district court did agree with respondents' second argument. It found that petitioner had no property right to some $20,000.00 of his annual salary because that was the amount assigned to the Medical Practice Income Plan (MPIP). An MPIP rule stated that an employee's salary assigned to this fund was discretionary, and could be taken without cause or hearing. Williams, however, was not a member of MPIP and had never agreed to its terms. Furthermore, as a non-physician he was barred from membership.

The court went on to find that even if Williams did have a property interest in that portion of his salary, he had received appropriate due process before it was taken. This was because the salary was something other than employment

and thus did not require the formal due process procedures set out in *Ferguson v. Thomas*, 430 F.2d 852, 856 (5th Cir. 1970).

In due course, the petitioner took an appeal from this judgment to the Fifth Circuit. In its opinion, the court of appeals immediately addressed the issue of whether petitioner had a property interest in his salary. It found that "[a]ny property interest Williams had in his entire salary was tenuous at best...". *Williams v. Texas Tech Univ. Health Sciences Center*, 6 F.3d 290, 292 (5th Cir. 1993). The court acknowledged that:

> An expectation of employment carries with it some protected expectations as to a salary. In some situations that expectation can encompass an employee's entire salary.
>
> *Id.*

But the court reasoned the right to salary may become separated from the right to employment. It found "the more detailed and conditional the understanding becomes between employer and employee, the weaker the linkage becomes between those understandings and the Due Process Clause." *Id.*, at 293.

The relationship between Williams and the institution was found to have passed "that point," an apparent reference to the point where a property right is still attached to the salary. This was so, according to the court, for two reasons. First, the tenure rule cited above allowed annual adjustments in a tenured professor's salary. From the employee's standpoint, this allows a unilateral taking at worst, and reduced procedural protection at best. Second, the court

relied on the MPIP rule authorizing unilateral salary reductions even though Williams was not a member of the plan.

REASONS FOR GRANTING THE WRIT

I.

The Fifth Circuit has for the first time in a due process case severed a property right to salary from a property right to employment itself.

The existence of a property interest in one's state employment is ordinarily a question of state law. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Board of Regents v. Roth*, 408 U.S. 564 (1972). To have a property interest in a governmental benefit, including employment, an individual must have an entitlement to the benefit. *Id.*, at 577. It is not contested Williams had a constitutional property interest in his employment. He was a tenured professor who could not be dismissed without due process of law.

Once it has been established that a property right exists in an entitlement, the question becomes what process is due before there can be a deprivation. *Morrissey v. Brewer*, 408 U.S. 471 (1972). Three factors, set out in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), form a part of due process analysis, and were considered in the instant case:

> First, the private interests that will be affected by the official actions; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional

> or substitute procedural safeguards; and finally the Government's interest including the function involved and fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

In tenure cases, it has long been established that before employment may be taken from a tenured professor a full evidentiary hearing is required. *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970). Petitioner did not receive such a hearing before $20,000.00 per year was taken from his salary. Indeed, respondents conceded there was no cause to deprive petitioner of his employment.

Because of this underlying fact, respondents have no choice but to argue petitioner's salary is separate from his employment. Once separated, the salary, or major portions of it, is said to be of lessened importance. Under *Mathews v. Eldridge*, lesser procedural safeguards are then permitted, and *Ferguson v. Thomas* protections are inapplicable. Without significant examination of petitioner's property right, the court of appeals has agreed with this argument. The right petitioner has to his salary has been severed from his right to employment.

The danger in such reasoning is that an otherwise defective procedure will be made compatible with due process by merely redefining the property interest. A challenged procedure thereby is made acceptable by reducing the right it failed to adequately protect. The application of such a test, in the absence of a degree of care beyond most institutions, dictates the result. If the procedural scheme does not rise to the commensurate level of the property right, the property interest is reduced to accommodate the existing procedure. Stated differently, the procedure will define the right.

The prohibition against defining a property right by the procedures enumerated for its deprivation, as set out in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), is directly violated. Government employers may make a tautology of the due process clause.

II.

The Fifth Circuit has allowed a tenured professor's right to employment to carry the "bitter with the sweet" in violation of the rule in *Cleveland Board of Education v. Loudermill*.

Stripped to its essential principle, respondents argue they may take an element of an employee's property right in employment (such as salary) without due process or with lesser procedure than otherwise required. They maintain it is only necessary to balance the isolated element against procedural safeguards, rather than weigh the fundamental employment right. This is a backdoor attempt to define the vested property right by the procedures that were actually given.

Prior to 1985 governmental officials sought to justify the unilateral taking of property interests by claiming such interests carried no obligation for due process. The state, so the argument ran, could provide for the unilateral termination of the right at the time the right itself was created. Such a property interest, therefore, carried the "bitter with the sweet."

This was flatly rejected by the Supreme Court in 1985:

> [I]t is well settled that the "bitter with the sweet" approach misconceives the constitutional guarantee. If a clearer holding is

> needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights - life, liberty, and property - cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." [citations omitted].
>
> In short, once it is determined that the Due Process Clause applied, "the question remains what process is due." *Morrisey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed. 2d. 484 (1972). The answer to that question is not to be found in the Ohio statute.
>
> *Cleveland Board of Education v. Loudermill*, 470 U.S. at 541.

In this case no procedural protections were given petitioner. The appeals court has held that despite the clear creation of a property interest in the employment of a tenured faculty member no effective process was due because of the "adjustment to salary" rule and because of the MPIP rule. But as this Court said in *Loudermill*, the answer to what

procedure is due, once a property right has been granted, is not to be found in the state statute. *Id.* Neither is it to be found in the policies of Williams' employer.

The benefit of a property right is due process. The amount of due process available is determined by the nature of the right not by the procedure appropriated to it by the government. What seems clear in the abstract can become vague in practice. In Dr. Williams' case a major portion of his property right was taken without the constitutionally mandated procedure. This seizure was accomplished by referring to a component part of the employment right as if it was a constitutional right in its own stead. By dividing the components of the employment right it could be deemed that only one of the lesser rights was involved. It can then be said that this newly discovered right deserves a lesser procedure than the right that was actually granted. No other court has held that salary is a separate property right that does not implicate the more serious right of employment itself.

III.

The misapplication of *Mathews v. Eldridge* cannot justify the severance of salary from a protected property interest in employment, and raises important and unresolved questions.

The court of appeals misapplied *Mathews v. Eldridge* by ignoring the private interest affected by the action of the public employer. The property interest is never defined; it is only compared to the property at issue in other cases.

Williams' interest is said to be greater than that of a claimant for a final paycheck (*Eguia v. Tompkins*, 756 F.2d 1130 (5th Cir. 1985)), but less than the interest of a recipient

of governmental benefits who is "on the very margin of subsistence." (*Goldberg v. Kelly*, 397 U.S. 254 (1970)), *Willams*, at 293. Moreover, his interest, according to the court, "falls short of the termination decision contested in *Texas Faculty*." *Id.*, citing *Texas Faculty Ass'n v. University of Texas at Dallas*, 946 F.2d 379, 384 (5th Cir. 1991) (loss of tenured faculty position because of closing of entire academic department requires objective criteria and other procedural safeguards).

Williams, of course, did not lose his job in its entirety, as in *Texas Faculty*, nor was he placed beyond the threshold of poverty, as was at risk in *Goldberg*. Such circumstances are not required in order to obtain full due process. The comparison of property interests or the severity of resulting injuries may be relevant at some stage of due process analysis, but the private interest is not thereby defined.

A property interest in a public employee's job for purposes of constitutional due process must be determined by reference to state law. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982); *Bishop v. Wood*, 426 U.S. 341, 344 (1976); *Wells v. Hico I.S.D.*, 746 F.2d 243, 252 (5th Cir. 1984). A protected property right exists if the employee has a "legitimate claim of entitlement to continued employment." *Board of Regents v. Roth*, 408 U.S. 564, 577, (1972); *Martinez v. South San Antonio I.S.D.*, 817 F.2d 1124, 1125 (5th Cir. 1987); *Conley v. Board of Trustees of Grenada County Hospital*, 707 F.2d 175, 179 (5th Cir. 1983). The property interest can emanate from a statute, employment contract or other relevant state law source. *Bishop, supra*, at 344; *Perry v. Sindermann*, 408 U.S. 593 (1972); *Conley, supra* at 179; *White v. Miss. St. Oil and Gas Bd.*, 650 F.2d 540, 541 (5th Cir. 1981). In the instant case it emanated from TTUHSC's grant of tenure, and the corresponding

salary it agreed to pay regardless of source.

The hallmark of a property interest in one's state governmental employment is an individual entitlement grounded in state law, which cannot be removed except for cause. *Logan, supra* at 430; *Arnett v. Kennedy*, 416 U.S. 134 (1974). It has been clearly held that tenure is just this type of entitlement. *Yatvin v. Madison Metro Sch. Dist.*, 840 F.2d 412 (7th Cir. 1988); *Harden v. Adams*, 760 F.2d 1158 (11th Cir. 1985); *Findeisen*, supra; *Simmons v. Drew*, 716 F.2d 1160 (7th Cir. 1983).

In *Board of Regents v. Roth*, 408 U.S. at 577, the court declared that a person's interest in a benefit is a "property" interest for due process purposes if there are such rules or understanding "that secure certain benefits and that support claims of entitlement to those benefits." A unilateral deduction of money from the employee's paycheck, without a hearing, violates due process where a property right to employment exists. *Orloff v. Cleland*, 708 F.2d 372, 378 (9th Cir. 1983).

The Fifth Circuit itself has held that "[t]here can be no doubt that the plaintiff's interest in his salary and expense reimbursement is a property interest protected by the constitution." *Eguia v. Tompkins*, 756 F.2d 1130 (5th Cir. 1985) citing, as examples, *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820 (1969); *Orloff v. Cleland*, 708 F.2d 372, 378 (9th Cir. 1983). It is also well established that "...as long as a property right is not *de minimus*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause." *Goss v. Lopez*, 419 U.S. 565, 576, 95 S.Ct. 729, 737 (1975). A $20,000.00 per year reduction in salary is not *de minimus*.

The court of appeals has engaged in *Mathews v. Eldridge* balancing with small regard to one of the weights

it has placed in the measure. It accords little substance to the property interest of the employee, and, as a result, the minimal safeguards are found to be in balance.

The safeguards are small indeed: notice consisted of one oral statement and one memorandum, followed by the fact, as found by the court, that "[o]n both occasions Williams responded." *Williams*, at 293. For these procedures to have been satisfactory in a balancing test the counterweight must have had the substance of a gossamer. Little or nothing was placed on one side of the scales, and little or nothing was required to achieve equilibrium.

This process cost Dr. Williams thirty percent of his salary. Unlike *Arnett v. Kennedy* and *Mathews v. Eldridge*, Williams was not entitled to a post deprivation hearing or an extensive administrative review. He was told his salary was being drastically cut, he responded as best he could, and, as predicted, his pay was reduced. No safeguard traditionally associated with the seizure of property was accorded Williams. An exchange of memoranda was all the formality required.

May a further reduction permissibly occur, followed by another, until all of Williams' salary would be exhausted? The trial court rejected this notion, stating that if no meaningful protection attached to some of the salary, it could be reduced to $1.00 per annum. The trial court erred by protecting only a portion of the salary. The court of appeals, however, compounded this error by being even less precise, albeit not in the context of *Mathews v. Eldridge* analysis. In discussing qualified immunity, the court acknowledged "some protected expectations as to a salary," *Williams* at 293, but recognized the "ebb and flow" of salary adjustments. *Id.*, at 294. The court could not "say that the law clearly established that his property interest in the entirety of his salary was constitutionally protected." Id.

Was the law clearly established as to **some** of his salary? At what point on the salary scale does this occur? What level of injury, to use the court's approach, is required? The thirtieth percentile of the salary, in the Fifth Circuit, is not entitled to full due process protection. Does such protection attach thereafter, or must a significantly higher percentage be reached?

The most intriguing question asks what the court would have done had all the salary been taken by Williams' superiors. Surely a greater weight would have been given to the property interest in the *Mathews v. Eldridge* balancing test. The language cited above indicates that full due process would be required. If this is so, the fragmentation of Williams' property interest makes even less sense.

The placement of some, but not all, of one's salary within the protection of the Constitution has resulted in the reduction of a right. This piece-meal approach thwarts the reasonable expectation of continued employment. How may one have a property right in employment, but not have a right to the corresponding salary?

Other courts of appeal that have dealt with the issue of salary deprivation where there is a property right in employment have concluded salary is simply a benefit of the employment and not a separate property right. The Eleventh Circuit has found that the property interest of a tenured teacher is what is implicated when that teacher is suspended without pay. *Hardiman v. Jefferson Cty. Bd. of Educ.*, 709 F.2d 635 (11th Cir. 1983). In a separate case this court also concluded that a two week suspension of a merit system employee impinged on his property right in employment. *Best v. Boswell*, 696 F.2d 1082 (11th Cir. 1982), *cert. denied*, 104 S.Ct. 103(1983). In a case in the Tenth Circuit the court found where a property right in employment

existed, a four day suspension violated that right and required due process even in light of a city ordinance to the contrary. The Third Circuit has determined that if a plaintiff had a property interest in employment, a twenty-nine day suspension violated the protected property interest. *Louise B. v. Coluatti*, 606 F.2d 392 (3rd Cir. 1979).

If the Fifth Circuit's decision in this case is allowed to stand, tenure, as previously defined by the Supreme Court, will be made largely meaningless. If an institution cannot pass procedural muster for dismissal, it will simply take the employee's salary or enough of it to drive off the employee. Obviously, an employee will not stay employed long if he or she is not paid. Government employers are not required to grant employees a property right in employment. However, if they choose to do so, a Fourteenth Amendment property right is brought to bear. If the benefits of this right are allowed to be treated separately there will be only an illusory property right to employment. That right will be subsumed by the lesser "right" to salary and reduced procedural safeguards.

The lower courts need guidance from this court as to the application of the rule in both *Loudermill* and *Mathews v. Eldridge* in situations where salary is parted from the underlying property right in employment.

CONCLUSION

For the various reasons stated above this petition for certiorari should be granted. If petitioner is correct that salary cannot be separated from a property interest in employment this case should be remanded to the District Court for trial.

Respectfully submitted,

MARK BERRY
EDWARD W. DUNBAR
1700 North Stanton St.
El Paso, Texas 79902

Counsel for Petitioner

January 20, 1994

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8451

D.C. Docket No. EP 91 CV 316

CHARLES H. WILLIAMS,
Plaintiff-Appellants,

versus

TEXAS TECH UNIVERSITY HEALTH SCIENCES CENTER, ET AL.,
Defendants,

EDWARD C. SALTZSTEIN, JOSEPH BROWN, III and JAMES C. LEWIS,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

Before POLITZ, Chief Judge, HIGGINBOTHAM, Circuit Judge, and DAVIDSON,[1] District Judge.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

---

1. District Judge of the Northern District of Mississippi, sitting by designation.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

October 22, 1993

ISSUED AS MANDATE: NOV 15 1993

A true copy
Test
Clerk, U.S. Court of Appeals, Fifth Circuit
By /s/ illegible
Deputy.
New Orleans, Louisiana NOV 15 1993

WILLIAMS v. TEXAS TECH UNIV. HEALTH SCIENCES CTR.

Charles H. WILLIAMS,
Plaintiff-Appellant,
v.
TEXAS TECH UNIVERSITY HEALTH SCIENCES CENTER, et al.,
Defendants,

Edward C. Saltzstein, Joseph Brown, III and James C. Lewis,
Appellees.

No. 92-8451.

United States Court of Appeals,
Fifth Circuit.

Oct. 22, 1993.

Tenured professor at state university medical center brought action against university officials alleging that reduction of his salary violated his due process rights. The United States District Court for the Western District of Texas, Walter S. Smith, Jr., J., entered summary judgment for officials, and professor appealed. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that: (1) procedures followed in reduction of salary met due process requirements; (2) officials were entitled to qualified immunity; and (3) officials did not violate professor's substantive due process rights.

Affirmed.

Appeal from the United States District Court for the Western District of Texas.

Before POLITZ, Chief Judge, HIGGINBOTHAM, Circuit Judge, and DAVIDSON,* District Judge.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

A professor claims that the decision to reduce his salary violated the Constitution. We affirm the district court's grant of judgment as a matter of law against the professor.

I.

Texas Tech University Health Sciences Center hired Dr. Charles Williams as an associate professor and director of anesthesiology research in 1982 at an annual salary of $42,016.92, assigning him to the El Paso Regional Academic Health Center. The university granted him tenure in March 1986. In September 1987 he became director of research in the department of surgery and his compensation increased to $68,004 per year; $64,000 in base salary and $4,204 in fringe benefits.

---

* District Judge of the Northern District of Mississippi, sitting by designation.

Part of Williams's salary came from the Medical Practice Income Plan, a fund collected from professional activities of the physician faculty members. In early 1989, Dr. Edward Saltzstein, the department chair, told Williams that as of September 1, 1989, MPIP funds would not be used to augment Williams's salary because Williams had not generated the expected amount of grant money. Saltzstein sent a memo to Williams stating his plans and reasons on March 21, 1989. In mid-1989 the surgery department received budget documents indicating that Williams was entitled to the full $68,000 salary. A form was filled out in early September to amend the budget to reflect Williams's lower salary, which was approved by administrators Dr. Joseph Brown, III & James Lewis. September 1, 1989, Williams began receiving an annual salary of $46,449.

In 1991 Williams sued the University Health Science Center, the medical school's Medical Practice Income Plan, Saltzstein, Brown and Lewis, alleging that his salary decrease had been achieved by denying him procedural and substantive due process and that the decrease gave rise to state law claims for intentional infliction of emotional distress and breach of contract. In 1992 he voluntarily dismissed all his claims except for his constitutional claims against the university officials in their individual and official capacities. Those claims were tried to a jury in July 1992, and at the close of Williams's case-in-chief the district court granted the officials' oral motion for judgment as a matter of law.

II.

A.

Any property interest Williams had in his entire salary was tenuous at best, as we will explain. In any event, he received the process due him. The Supreme Court

has identified three factors to weigh in deciding how much process a property interest deserves:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 385, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). The "minimal" process set out by our cases applying *Eldridge* is notice of the reasons for a proposed deprivation and some opportunity to respond to the substance of the allegations before a final deprivation occurs. *See Eguia v. Tompkins*, 756 F.2d 1130, 1139 (5th Cir. 1985).

Williams received this baseline procedural protection. In early 1989, Saltzstein told Williams that MPIP funds would no longer be used to augment his salary and Williams would have to generate grant funds himself. On March 21, 1989, Saltzstein sent the memo to Williams described earlier. On both occasions Williams responded. Nothing more was required on these facts.

A state university has a significant interest in having reasonable discretion to administer its educational programs. *Texas Faculty Ass'n v. University of Texas at Dallas*, 946 F.2d 379, 385-86 (5th Cir. 1991). *See also Board of Curators v. Horowitz*, 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978); *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct.

729, 42 L.Ed.2d 725 (1975) (both finding that student suspension requires minimal process because of the freedom of action required for effective school administration). The strength of that interest gives schools leeway in making broad budget decisions that may affect only a few employees. *See generally Texas Faculty*, 946 F.2d at 387-89.

Williams's interest in a specific level of income does not outweigh the state's. *Eguia v. Tompkins*, 756 F.2d 1130 (5th Cir. 1985), required few procedural safeguards for the decision to withhold a final paycheck because the interest was "substantial, but . . . [not] of the same magnitude as the interest of a person 'on the very margin of subsistence' in the receipt of governmental benefits." *Id.* at 1138 (quoting *Goldberg v. Kelly*, 397 U.S. 254, 264, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287 (1970)). This case involves more money over a longer period than the check at issue in *Eguia*, but falls short of the termination decisions contested in *Texas Faculty*, 946 F.2d at 384. Significantly, the low risk of erroneous decision making entailed by the process used further erodes Williams's claim that he deserved more process. *See Texas Faculty*, 946 F.2d at 386. The district court properly granted judgment as a matter of law on all procedural due process claims.

B.

Alternatively, the district court correctly granted judgment to defendants in their individual capacity. The uncertainty about Williams's asserted property right in his entire salary gave the administrators qualified immunity to claims for money damages. Government officials sued in their individual capacities for money damages enjoy qualified immunity from liability for money damages if their conduct did not violate clearly-established law of which a reasonable official would have been aware. *Anderson v. Creighton*, 483

U.S. 635, 639-40, 107 S.Ct. 3034, 3038-39, 97 L.Ed.2d 523 (1987). Property interests are created and their dimensions are defined by existing rules or understandings under state law. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 83 L.Ed.2d 548 (1972). An interest can arise from a "mutually explicit understanding" between an employer and employee. *Perry v. Sinderman*, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699, 33 L.Ed.2d 570 (1972).

An expectation of employment carries with it some protected expectations as to a salary. In some situations that expectation can encompass an employee's entire salary. *See Eguia v. Tompkins*, 756 F.2d 1130, 1138 (5th Cir. 1985)); *Orloff v. Cleland*, 708 F.2d 372, 378 (9th Cir. 1983). But the more detailed and conditional the understanding becomes between employer and employee, the weaker the linkage becomes between those understandings and the Due Process Clause. *See Mangaroo v. Nelson*, 864 F.2d 1202, 1206-08 (5th Cir. 1989). At some point the linkage is uncertain enough to justify qualified immunity for an official accused of breaking it.

This relationship arguably passes that point. The background to the relationship includes two university regulations that envision an employment relationship with some "ebb and flow." First, the tenure regulations allow annual adjustments in a tenured professor's salary:

> A tenured appointment assures the right of the faculty member to a continuing academic position of employment. The tenured faculty member's contract, however, is subject to possible annual adjustments regarding salary, rank, and conditions of employment.

§ 6.04(5)(A) ("Conditions of Tenured Appointments"). Second, section 2.31 of the MPIP bylaws states that "[i]t is expressly understood that each member's augmentation as determined under Section 2.33, shall not be guaranteed to any such member." Section 2.33 mandates that each member's augmentation shall be determined annually based on the recommendations of various administrators and approval of the president.

Given the uncertainties underlying the employment relationship between the university and Doctor Williams, we cannot say that the law clearly established that his property interest in the entirety of his salary was constitutionally protected. The "mutually explicit understanding" between the university and Dr. Williams rested on periodic evaluations and salary revisions. A reasonable administrator could have concluded on these facts that Dr. Williams's salary could be adjusted without treading on ground clearly protected by the Constitution. The district court correctly granted judgment as a matter of law in favor of the administrators on the issue of their qualified immunity.

III.

We now turn to Williams's substantive due process claims. To state a substantive due process claim a plaintiff must show that the government's deprivation of a property interest was arbitrary or not reasonably related to a legitimate governmental interest. *Brennan v. Stewart*, 834 F.2d 1248, 1256 (5th Cir. 1988). Judicial evaluation of academic decisions requires deference and they are overturned only if they are "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 225, 106 S.Ct. 507, 513, 88 L.Ed.2d 523 (1985).

Defendants Saltzstein, Brown, and Lewis each testified that Williams's salary was reduced for lack of grant productivity and lack of funded grant salary support. The district court properly granted judgment as a matter of law on all claims involving substantive due process.

AFFIRMED.

A true copy
Test
Clerk, U.S. Court of Appeals,
Fifth Circuit
By: /s/ illegible
Deputy
NOV 15 1993
New Orleans, Louisiana

FILED
AUG 21 2 39 PM '92
CLERK
CHARLES W VAGNER
BY
DEPUTY /s/ illegible

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

CHARLES H. WILLIAMS,	§	
Plaintiff,	§	
v.	§	
	§	Civil No.
EDWARD C. SALTZSTEIN,	§	EP-91-CA-316-S
JOSEPH BROWN, III, AND	§	
JAMES E. LEWIS,	§	
Defendants.	§	

JUDGMENT

In accordance with its Memorandum Opinion, the Court enters judgment as follows:

IT IS ORDERED, ADJUDGED AND DECREED that Defendants' Motion for Directed Verdict is GRANTED. It is further

ORDERED, ADJUDGED AND DECREED that this case is DISMISSED.

SIGNED this 19th day of August, 1992.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

FILED
AUG 21 1 48 PM '92
CLERK
CHARLES W. VAGNER
BY /s/ illegible
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

CHARLES H. WILLIAMS,	§	
Plaintiff,	§	
v.	§	
	§	Civil No.
EDWARD C. SALTZSTEIN,	§	EP-91-CA-316-S
JOSEPH BROWN, III, AND	§	
JAMES C. LEWIS,	§	
Defendants.	§	

MEMORANDUM OPINION

Came on to be considered the Defendants' Motion for Directed Verdict. This matter was tried to a jury on July 22,23, 1992. After presenting his case, the Plaintiff rested and Defendants orally urged this motion. The Court granted the Defendants' motion.

I. *Background*

Plaintiff was hired by Texas Tech University Health Sciences Center on September 6, 1982 as an Associate Professor and Director of Anesthesiology Research at an annual salary of $42,016.92. Plaintiff has a Ph.D. in biochemistry. He was assigned to the El Paso Regional Academic Health Center. Plaintiff was granted tenure on March 14, 1986. In September, 1987, Plaintiff became

Director of Research in the Department of Surgery. At that time, Plaintiff's salary was $45,204.00. His salary was augmented when he became Director of Research so that it totaled $64,800.00. This increase was funded by the Medical Practice Income Plan (MPIP). MPIP is a fund consisting of fees generated from the professional services offered by the faculty physicians. The augmented portion of Plaintiff's salary was discontinued in September, 1989. Plaintiff filed this suit pursuant to Title 42, United States Code, Section 1983 alleging procedural and substantive due process violations. Each defendant was sued in his individual and official capacity.

II. *Motion for Directed Verdict*

"A directed verdict is appropriate only if, after considering all the evidence and drawing all inferences therefrom in favor of the non-moving party, the court is convinced that no reasonable jury could find in favor of the non-movant." *Lloyd v. John Deere Co.*, 922 F.2d 1192, 1194 (5th Cir. 1991) (citations omitted). The "decision to grant a directed verdict . . . is not a matter of discretion, but a conclusion of law based upon a finding that there is insufficient evidence to create a fact question for the jury." *In re Letterman Bros. Energy Securities Litigation*, 799 F.2d 967, 972 (5th Cir. 1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373 (1987).

III. *Discussion*

The first issue presented by Defendants concerns the statute of limitations. The limitations period for a suit brought under section 1983 is two (2) years. *See Kline v. North Texas State Univ.*, 782 F.2d 1229, 1232 (5th Cir. 1986). The two (2) year period begins to run when the plaintiff knows or has reason to know of the injury which

forms the basis of his suit. *Id.* This suit was filed September 3, 1991. Plaintiff claims he did not know of the injury until September 20, 1989 when his augmentation was discontinued. Defendants claim Plaintiff knew or should have known of the injury as early as March, 1989. The Court agrees. Plaintiff's Exhibit 41 is a letter from Defendant Saltzstein to Plaintiff dated March 21, 1989. It informs the Plaintiff that he must generate the augmentation portion of his salary; otherwise, his salary will be the "State base of $45,204." The Court believes this letter was sufficient to put Plaintiff on notice of the injury and start the statute of limitations. Therefore, this suit is time-barred.

Even if Plaintiff timely filed his suit, the Court does not believe he had a property interest in the augmented portion of his salary. In order to state a procedural or substantive due process claim, Plaintiff must first demonstrate a property interest. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Plaintiff claims that, due to the fact that he was tenured, his employment could be terminated only for cause. Defendants do not dispute this and the Court believes there is no doubt that Plaintiff had a property interest in his *job*. However, Plaintiff claims that this property interest was taken without due process when his augmented *salary* was discontinued without cause. Plaintiff attempts to extend the property interest in his job to his augmented salary. To some extent, Plaintiff's property interest in employment does extend to his salary. *See Eguia v. Tompkins*, 756 F.2d 1130, 1138 (5th Cir. 1985). The Court does not believe such an extension can be made to Plaintiff's augmented salary. Plaintiff is still employed by Texas Tech and is still receiving his base salary.

Defendants argue that the definition of "tenure" permits adjustments of salary. Plaintiff claims this is a "bitter with the sweet" argument. The Court rejects both contentions. As to the former, the Court has already held that Plaintiff's property interest in his job extends to his base salary. To hold otherwise, would permit the Defendants to lawfully reduce a person's salary to one dollar ($1.00) if they so desired. Whether or not the adjustments of salary referenced by Defendants extends to augmented salaries will be addressed below. As to the latter, "tenure" is not "defined by the procedures provided for its deprivation." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541, 105 S.Ct. 1487, 1493 (1985). "Tenure" is defined as including possible adjustment of salary; no procedures for depriving a person of tenure are found in the definition. Thus, the "bitter with the sweet" line of cases is inapposite.

The Court believes Plaintiff had no property interest in his augmented salary due to the MPIP bylaws. Under those bylaws, augmentation is not guaranteed is and subject to annual determination. *See* Plaintiff's Exhibit 112. Defendants' reliance on the adjustments of salary language above is misplaced. No mention is made of augmented salaries. The Court believes Plaintiff had no property interest in his augmented salary.

Even is Plaintiff had a such a property interest, the evidence at trial established that he received adequate due process. Plaintiff argues that the amount of process he was due was established in *Ferguson v. Thomas*. 430 F.2d 852, 856 (5th Cir. 1970). Once again the Plaintiff is attempting to equate the discontinuation of his augmented salary with a termination of employment without cause. The due process protections enunciated in *Ferguson* were in response to the termination of a tenured professor. As stated, Plaintiff was not terminated. Plaintiff's salary was reduced. In such a

case, the Court believes notice and an opportunity to respond in writing were all that were required to satisfy due process. *See Texas Faculty Ass'n v. Univ. of Texas at Dallas*, 946 F.2d 379, 388 (5th Cir. 1991). This is especially true in light of the government's interest in effectively administering its educational institutions. *Id.* at 385. The Court does not believe a formal hearing was required. *See Eguia*, 756 F.2d at 1138. Here, Plaintiff was given notice of the discontinuation of his augmentation in March, 1989. In September of that year, as Defendant Saltzstein warned, Plaintiff's augmentation was discontinued. Plaintiff then wrote several letters objecting to the discontinuation. Each letter received a response which attempted to answer Plaintiff's questions. Procedural due process was satisfied.

Plaintiff's claim involving a denial of substantive due process require a showing of arbitrary and capricious behavior. *See Daniels v. Williams*, 474 U.S. 327, 337, 106 S.Ct. 677, 678 (1986) (Stevens, J., concurring). Decisions made by public universities regarding personnel and education must be afforded great deference. *See Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 225-26, 106 S.Ct. 507, 513-14 (1985). There was absolutely no evidence of any arbitrary and capricious behavior on behalf of Defendants.

Finally, the Defendants have asserted the defense of qualified immunity. This defense applies only to Plaintiff's suit against the Defendants in their individual capacities. *Kentucky v. Graham*, 473 U.S. 159, 165-68, 105 S.Ct. 3099, 3105-06 (1985). Defendants are entitled to prevail on this defense if their conduct did not violate clearly established law. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982). The Court believes the law concerning a tenured professor's property interest in salary augmentation is not clearly established today, let alone in 1989. The law

was clearly established as to the items in which Plaintiff did have property interest. However, as stated, Plaintiff's employment was not terminated and his base salary was not reduced. Plaintiff's attempt to extend these property interests to his augmentation is logical, but inappropriate. Furthermore, the law granting such a property interest, if any, was not clearly established because the definition of "tenure" and the MPIP bylaws contain language which have been proven to be subject to different interpretations. *See Mangaroo v. Nelson*, 864 F.2d 1202, 1207 (5th Cir. 1989). Nor was the law concerning the process to afford in such a situation clearly established. *See Texas Faculty Ass'n*, 946 F.2d at 381 (case of first impression). Because a termination was not involved, the requirements of *Ferguson* were not applicable. Thus, no clear statement of what process was due existed in 1989. The Court believes the same holds true for what constituted arbitrary and capricious behavior in 1989. Defendants are not liable in their individual capacities. Accordingly, it is

ORDERED that Defendants' Motion for Directed Verdict is GRANTED. It is further

ORDERED that any motions not previously ruled on are DENIED as moot. It is further

ORDERED that this case is DISMISSED.

SIGNED this 19th day of August, 1992.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE